Supreme Court, U.S.
FILED
AUG 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-98

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANSCHUETZ & CO., GMBH,

Petitioner,

v.

MISSISSIPPI RIVER BRIDGE AUTHORITY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a district court may order the production in the United States of documents located in the Federal Republic of Germany and the taking of oral depositions in the United States of employees of a party residing in Germany in disregard of the multilateral Convention on the Taking of Evidence Abroad in Civil and Commercial Matters.

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This brief for the Federal Republic of Germany is filed with the consent of the parties.[1] With U.S. Department of State circular note, dated August 17, 1978, to the Chiefs of Missions in Washington, D.C., the Federal Republic of Germany was informed that the procedure of transmitting diplomatic notes to the Supreme Court is not authorized by the

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[1]Letters expressing such consent are on file with the Clerk of the Court.

rules of the Court, and that the Court prefers foreign governments to present their views by filing amicus curiae briefs.[2] The views of the Federal Republic of Germany are accordingly expressed herewith.

I. INTEREST OF THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE

The Federal Republic of Germany's interest in this case derives from it being a state party to the multilateral Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (hereinafter cited as Evidence Convention), entered into force between the United States and the Federal Republic of Germany on June 26, 1979. The issue before the Court is the proper interpretation and application of this Treaty to which seventeen nations are parties.[3] The court of appeals' holding in *In re Anschuetz*, 754 F.2d 602 (5th Cir. 1985), permitting a district court to order, under the threat of sanctions, (a) the production in the United States of documents located in the Federal Republic of Germany and (b) the taking of testimony in the United States of petitioner's employees residing in the Federal Republic of Germany, violates the Convention and infringes upon German sovereignty. The substantial interest of the Federal Republic of Germany is further evidenced by its amicus curiae brief to the court of appeals on the issue of the applicability and scope of the Evidence Convention. The Federal Republic of Germany adheres to the position expressed in that brief, but sets forth below in support of the petition for writ of certiorari additional considerations.

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[2] *See* 1978 Digest of U.S. Practice in Int'l Law at 560.

[3] For a list of signatories see 1984 Treaties in Force at 251.

II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner, a corporation organized under the laws of and domiciled in the Federal Republic of Germany, is a third party defendant to a complaint for damages resulting from the alleged failure of a steering device furnished by petitioner in a vessel involved in a ship collision in the port of New Orleans.

The district court ordered the taking of depositions of petitioner's employees in Germany and the production in the United States of documents located in Germany. *Anschuetz*, 754 F.2d at 604. The court of appeals denied petitioner's application for a writ of *mandamus*. In denying the writ of mandamus the court of appeals held that a district court may order a party to produce in the United States documents located in the Federal Republic of Germany and to make available its employees residing in Germany for depositions in the United States.

III. SUMMARY OF ARGUMENT

To hold the Convention applicable only to the taking of evidence from persons over whom the court does not have jurisdiction[4] renders the Convention meaningless and is inconsistent with its language and with the intent and expectations of its signatories. Moreover, the court of appeals' decision, allowing courts to order, under the threat of sanctions, the removal of documents located in Germany to the United States and the testimony of German residents in the United States, violates the Federal Republic of Germany's sovereignty. The Federal Republic of Germany considers

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[4]The court of appeals recognized the applicability of the Convention to the taking of involuntary depositions of a party in the Federal Republic of Germany and to the production of documents gathered from persons in Germany who are not subject to the court's *in personam* jurisdiction. *Anschuetz*, 754 F.2d at 615.

the Evidence Convention a workable treaty. It believes the issues of its application and its scope deserve consideration by the Court. Therefore the Federal Republic of Germany supports the granting of certiorari.

IV. ARGUMENT

1. The Holding in Anschuetz is Inconsistent with the Language and the Legislative History of the Evidence Convention

The court of appeals limited the Convention to the taking of evidence abroad from persons over whom a district court does not have *in personam* jurisdiction and to involuntary depositions of a party conducted in a foreign country. Such limitations to non-party witnesses are inconsistent with the language, spirit, and legislative history of the Evidence Convention, and, if upheld, would substantially narrow its intended use.

The court of appeals, in analyzing the Convention's applicability, drew distinctions between (a) "parties" and "witnesses" and (b) "parties subject to the court's jurisdiction" and "persons not under the court's jurisdiction". These distinctions are not expressed in the text of the Convention and the drafters never intended them to exist.[5] The drafters intended the treaty to apply to the examination of persons regardless of their specific relationship to the litigation.[6] They therefore considered it unnecessary to distinguish between "witnesses, parties and experts", since these

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[5] *Explanatory Report of Philip Amram (Conference of the Hague Convention on Private International Law)*, Actes et documents de la onzieme sessione, TOME VI, 203 (1970) (hereinafter cited as Actes et documents).

[6] *Id.*

terms fall under the comprehensive and broad category of "persons".[7]

The United States delegation negotiating the treaty also expressed that "party" and "witness" were encompassed in the broad term "person".[8] It referred to Article 3 (e), (f) and (g) of the Convention which provides that a Letter of Request may be used to examine "persons".[9]

The German interpretation of the Evidence Convention coincides with the United States' interpretation. The legislative history of the treaty in the Federal Republic of Germany reveals that when the government presented the treaty to the Bundestag (parliament) for ratification, it intended that the requests for the taking of evidence abroad were to be directed at "persons", and that no distinction between parties and witnesses was to be made.[10]

The report on the Act to Implement the Evidence Convention by the Bundesrat (Upper House) either refers to "persons" or to both "parties and witnesses".[11] It never used or intended to use the term "party" or "witness" exclusively.

Accordingly, the positions taken by the United States and the Federal Republic of Germany are in agreement that the

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[7] *Id.*

[8] *Id.* at 30.

[9] *See also* United States *amicus curiae* brief at 6 in *Club Mediterranee v. Dorin, appeal dismissed, cert. denied*, 53 U.S.L.W. 3285 (U.S. Oct. 16, 1984) where the Department of Justice reiterated this view first expressed by the U.S. treaty negotiators.

[10] *Statement of the Government of the Federal Republic of Germany on the Act to Implement the Hague Convention*, Bundestagsdrucksache 8/218 at 9 (1977).

[11] *Report of the German Bundesrat on the Act to Implement the Hague Convention*, Bundestagsdrucksache 8/217 at 54 (1977).

Convention applies to persons generally. Neither country intended to limit the treaty's application solely to persons not under the court's jurisdiction as expressed by the *Anschuetz* court.

2. In Personam Jurisdiction is not Absolute in International Litigation

The vast majority of requests for the production of documents located in Germany is directed to parties subject to an American court's *in personam* jurisdiction. Limiting the Convention, as the court of appeals did, to cases in which persons are not subject to the court's *in personam* jurisdiction, would result in such infrequent use of the treaty as to render it meaningless. When the drafters convened to negotiate the treaty they could hardly have contemplated drafting a document with virtually no practical applicability.

As the Federal Republic of Germany stated in its brief to the court of appeals, it considers the taking of oral depositions in Germany and the production in the United States of documents located in Germany a violation of its sovereignty unless the order is transmitted and executed by Letter of Request under the Evidence Convention, regardless of whether the United States court has *in personam* jurisdiction over the German party.[12]

The Federal Republic of Germany likewise considers it a violation of its sovereignty when a foreign court forces, under the threat of sanctions, a person under the jurisdiction of German courts to remove documents located in Germany to the United States for the purpose of pre-trial

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[12]The United States in its amicus brief at 7 in *In re Anschuetz*, 754 F.2d. 602 (1985) recognized that the concern expressed by the Federal Republic of Germany over its sovereignty ". . . requires the district court to reconsider that order and to apply a careful comity analysis".

discovery, or orders a person, under the threat of sanctions, to leave the Federal Republic of Germany and travel to the United States to be available for oral depositions. The taking of evidence is a judicial function exclusively reserved to the courts of the Federal Republic of Germany.[13] Only its courts are empowered to compel persons under their jurisdiction to comply with orders of a foreign court requiring the gathering of evidence in the Federal Republic of Germany and its removal to the United States.[14] Sovereign states must be committed to protecting their sovereignty within their territory.[15] If a U.S. court's exercise of *in personam* jurisdiction would violate Germany's sovereignty, the court should be required, in accordance with the principles of international comity, to first apply the methods for taking evidence abroad to which the United States and the Federal Republic of Germany have agreed under the Convention.

3. The Court of Appeals Misconstrued the Reservation under Article 23 of the Convention.

The court of appeals erroneously concluded that the reservation under Article 23 of the Convention would give foreign authorities complete power to determine how much discovery may be taken from their nationals who are litigants before American courts. *Anschuetz*, 754 F.2d at 612. Article 23 authorizes a signatory to declare that it will not execute Letters of Request issued for the purpose of obtaining pre-

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[13]*See, e.g.*, United States *amicus curiae* brief at 5 in *Volkswagenwerk A.G. v. Falzon, appeal dismissed*, 104 S. Ct. 1260 (1984).

[14]*See, e.g.*, Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad. The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev., 733, 761 (1983) (detailed discussion of "judicial sovereignty").

[15]*See* Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 Int'l Law. 487, 495 (1985).

trial discovery of documents as known in Common Law Countries.

The Article 23 reservation affects only one method of United States discovery. As the Federal Republic of Germany stated in its brief to the court of appeals (at 12) pre-trial discovery by way of oral depositions can be successfully effected in Germany under the Convention.[16] It has furthermore stated (at 14), that Germany permits the production of documents to be used at trial, allows the examination of witnesses relating to documents and intends to consider the practical experience gained thus far and to be gained in the future in connection with the promulgation of regulations for pre-trial production of documents.

The intent to accomodate foreign procedures is further evidenced by Section 14 of the Act to Implement the Hague Evidence Convention in the Federal Republic of Germany which provides:

> (1) Letters of Request which concern a procedure in accordance with Article 23 of the Convention will not be granted.
>
> (2) However, to the extent that the fundamental principles of the German Law of Procedure are not violated, such requests may be granted considering the justified interests of the persons involved, after the requirements for the granting of such requests and the applicable procedure have been implemented by Regulations which the Minister of Justice with the consent of the

[16] *See* Platto, *Taking of Evidence Abroad for Use in Civil Cases in the United States*, 16 Int'l Law. 575 (1982), where the author, an attorney of record in a transnational litigation, expressed his satisfaction with the execution of a request to take oral depositions by a German court in Munich.

Bundesrat (Upper House of Parliament) may issue. Bundesgesetzblatt 1977 I 3106.[17]

The reservation under Article 23 was thoroughly deliberated by the negotiators of the Convention and was agreed upon to satisfy the different legal systems to which the Convention would apply.[18]

The head of the United States delegation and official rapporteur of the Convention made it clear that the civil law countries could not be persuaded to change their procedures overnight to accomodate the liberal U.S. evidence taking procedures.[19] This clearly expresses the motivating force behind the drafting of the Convention to establish a uniform set of minimum procedures acceptable to all signatories to take due account of the substantial differences between the various legal systems involved. The holding of the court of appeals makes the reservation under Article 23 meaningless and establishes a result through judicial action which the signatory states could not and did not agree to at the drafting table. This issue deserves consideration by the Court.

4. The Convention Is Workable and Should Be Applied According to Its Terms

The Federal Republic of Germany recognizes that obtaining evidence abroad is not without difficulties and that the

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[17]The translation is provided by counsel for the amicus who is a member of the German bar.

[18]*See, e.g., Explanatory Report on the Convention on Taking of Evidence Abroad in Civil or Commercial Matters*, 12 I.L.M. 327, 329 (1973); *Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law*, 8 I.L.M. 785 at 809-9 (1969).

[19]Amram, *The Proposed Convention on the Taking of Evidence*, 55 A.B.A. J. 651, 655 (1969).

Convention has not in all respects fulfilled the desire, expressed by the signatories in the preamble, to improve mutual judicial cooperation in civil or commercial matters.

The Convention, however, has not been ineffective between the United States and the Federal Republic of Germany. From December 31, 1979, when the Evidence Convention came into force between the two nations, through 1984, 151 requests under the Convention were addressed to German courts. 131 of these requests were accepted and executed. Most of the remaining 20 requests were rejected because the evidence to be taken was not sufficiently identified or the request was for the production of documents under pretrial discovery.[20]

With regard to future requests for production of documents, the Department of Justice of the Federal Republic of Germany is considering, at the present time, regulations to permit the granting of certain of these requests. The holding in *Anschuetz* hinders this development, because it permits the exercise of discretion by American courts to take evidence abroad either by applying the methods of the Convention or by ordering the evidence to be produced in the United States. As a result the contemplated regulations involving the production of documents would be futile.

In a subsequent decision in *In re Messerschmitt Boelkow Blohm*, 757 F.2d 729 (5th Cir. 1985) the court of appeals reaffirmed its holding in *Anschuetz* permitting the district court to order the production of documents located in Germany in the United States. For the reasons stated above,

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[20]The Department of Justice of the Federal Republic of Germany requested the central authorities who are under the jurisdiction of the German Laender (States) to furnish these figures in order to advise the Court on the past experience with the Convention in the Federal Republic of Germany.

the *Messerschmitt* holding also violates the Evidence Convention and infringes on German sovereignty. The Federal Republic of Germany therefore also supports the petition for writ of certiorari filed in said case.

CONCLUSION

For the reasons stated above the Federal Republic of Germany requests the Court to grant the petition for writ of certiorari.

Respectfully submitted,

Date: August 1, 1985

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